

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Petition to Establish Procedural)	WC Docket No. 07-267
Requirements to Govern Proceedings for)	
Forbearance Under Section 10 of the)	
Communications Act of 1934, as Amended)	

COMMENTS OF THE CITY OF PHILADELPHIA

I. INTRODUCTION

The City of Philadelphia (“City”) respectfully submits these comments in response to the Notice of Proposed Rulemaking (“NPRM”) released on November 30, 2007, in the above-captioned proceeding.

II. BACKGROUND

In response to the September 19, 2007 *Petition for Procedural Rules to Govern the Conduct of Forbearance Proceedings* (the “Petition”), submitted by Covad Communications, et al., the FCC adopted its NPRM requesting public comment on the need for such procedural rules. The City believes procedural rules are imperative in order for the Commission to reassert control over its own regulatory agenda and to promote the public interest intended to be preserved by the forbearance provisions of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (“the Act”).

Congress in 1996 amended Section 10(c) of the Act to establish a right of any telecommunications carrier to petition for forbearance from regulations under the Act. Congress imposed a one year deadline for FCC action, which can be extended no more than 90 days by the FCC if it determines that it needs more time to evaluate the petition, and provided that if the FCC does not act before the deadline, the petition is deemed granted.

In recent years, there has been an increasing volume of petitions for forbearance. The impact of this flood of petitions threatens the FCC and the public with an industry-driven agenda that serves their special interests but no one else, and certainly not the public interest the Act's regulatory scheme seeks to protect.

Without clear procedural rules to establish a framework for fair handling of forbearance petitions, the Commission gives petitioners a strong incentive to avoid creating and submitting a full record that is sufficient to form the basis for informed public comment, reasoned objection, and Commission review. Interested parties and the general public are always at a disadvantage in not having the full statistical description of relevant markets that is available to telecommunications companies, including petitioners for forbearance, or the key financial data on petitioners' operations that is critical to evaluate a petitioner's claims of market competition. Petitioners are able to withhold key empirical data until late in the proceeding, thereby precluding the full public scrutiny which the review and comment process is intended to provide. Such strategy also compounds pressures on the Commission from the statutory deadlines for decision-making.

III. DISCUSSION

A. Procedural Rules are Necessary to Promote Fairness and to Safeguard the Public Interest

Given the extraordinary scope of regulatory relief available under the forbearance provision of Section 10 of the Act, which essentially permits the FCC to grant a petitioner special exemption from the provisions of the Act without any Congressional involvement, the FCC must develop procedural rules to ensure that decisions are based upon a full and complete record and that all parties concerned have an opportunity to contribute to that record. This is particularly important given the possibility of a default grant of the petition for forbearance absent timely FCC action.

1. Lack of Procedural Rules Jeopardizes the Commission's Ability to Grant Forbearance Petitions in a Manner Consistent with Statutory Requirements

As NATOA notes¹, the Commission is permitted to grant forbearance petitions only when doing so “is consistent with the public interest.”² The City concurs with NATOA that in the absence of procedural rules “there is simply no way to make sure that the public interest is adequately considered and protected.”³ Clearly, consideration of the public interest requires, at a minimum, similar treatment of similarly situated parties, a commitment to due process, and a clearly understood framework for decision-making that allows informed public comment, with reasonable time periods for review, comment, and issuance of decisions. While

¹ NATOA Comments at 3.

² 47 U.S.C. 160(a)(3).

³ NATOA Comments at 3.

the Commission has to date provided a degree of due process by inviting *sua sponte* comments from interested parties, this practice should be formalized by procedural rules.

2. Unsupported Filings, Encouraged by the Commission's
Procedural Void, Unfairly Shift the Burden to Objecting Parties

Procedural rules will ensure informed comment by requiring that all petitions for forbearance include a full presentation of the evidence, with objective statistical data, purportedly supporting claims made for market competition. Given the statutory deadline, the absence of procedural requirements encourages the submission of unsupported petitions. Petitioners can delay or avoid altogether submitting the evidence necessary for a reasoned assessment of market conditions, as required by the statute. Parties objecting to the petition must then expend resources to respond to incomplete petitions, often by doing their own research to uncover data that in a fair and orderly process should have been part of the petitioner's original filing. For example, in response to Verizon's recent petition for forbearance in the Philadelphia Metropolitan Statistical Area⁴, the City was forced research market conditions and locate relevant statistics on the penetration rates of various new technologies, all under the Commission's typically tight time constraints, because Verizon was permitted to file a petition with insufficient objective supporting data. Municipalities and competitive carriers have no choice but to respond, given the impact of a petition being granted or deemed granted, however thin the supporting evidence and irrespective of the petitioner's prospects of success. For the cities, this means an expenditure of very scarce resources simply because the Commission does not require the petitioner, by reasonable procedural

⁴ Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas. WC Docket No. 06-172.

rules, to make a credible case.⁵ Procedural rules are necessary to level the playing field between petitioners, who control the timing of their petitions and have vast resources to gather necessary data on markets and company operations, and the Commission, the general public, and municipalities, who must respond on deadlines with a fraction of the petitioners' resources.

B. Procedural Rules the Commission Should Adopt

The City urges the Commission to adopt rules that, at a minimum, provide a definite notice and comment period for all forbearance petitions, establish timelines conducive to the development of a full record, and impose filing obligations consistent with the statutory requirements.

1. The Commission Should Adopt Administrative Procedures Act (APA) Notice and Comment Procedures

As Covad Communications notes, imposition of APA notice and comment procedures is appropriate given the similarities between forbearance proceedings and other forms of Commission action in which APA rules apply.⁶ Given the need for procedural safeguards, and the availability of this known and tested model, adoption by the Commission of APA rules with respect to notice and comment and ex parte filings would provide clear guidance to all parties.

2. Adoption of Timelines

The Commission should adopt standard timelines that provide all parties with a full and fair opportunity to comment and, where necessary, to rebut evidence

⁵ See COMPTEL at 3.

⁶ Petition at 12. See also COMPTEL Comments at 6 ("While not a rulemaking proceeding per se, forbearance proceedings have the same effect, i.e., altering the application of rules to carriers.")

offered on the record. The Commission's present practice of establishing comment periods on a petition-by-petition basis makes the process unpredictable and unmanageable, particularly for municipalities and small competitors that, unlike the petitioning incumbent telecommunications companies, have only very limited resources for responding. In addition, the City urges the Commission to adopt by rule a comment period during which states are specifically invited to provide comments regarding market penetration rates and the likely affects of forbearance on competition and consumers. State governments typically have available market data that is unavailable to local jurisdictions, and more resources and authority for investigating market conditions. The active participation of states will materially enhance the record on which a forbearance petition is decided. Finally, the Commission should establish a timeframe for issuance of its written order required by Section 10(c). We concur with Covad Communications and NATOA that timely release of the written order is essential to protect the interests of parties who seek to appeal an order of the Commission.⁷

3. "Complete-as-Filed" Requirement

The Commission should adopt a policy of denying, without prejudice to refile, any forbearance petition that fails to include a basis for relief that is on its face adequate under Section 10(a) of the Act. Section 10(a) requires a determination that the following conditions have been satisfied prior to granting a petition for forbearance:

⁷ Petition at 32, and NATOA at 6.

- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
- (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
- (3) forbearance from applying such provision or regulation is consistent with the public interest.⁸

Also, Section 10(b) requires that the Commission, in determining consistency with the public interest under Section 10(a)(3), shall consider whether the forbearance requested will promote competitive market conditions and enhance competition among telecommunications service providers.

Requiring petitioners to demonstrate how they satisfy each of these statutory prerequisites would, as noted by NATOA, provide “pertinent information in a timely manner, which should enable the Commission to resolve petitions in a timely manner”,⁹ and would also establish clearly that the burden of proof in forbearance proceedings lies with the petitioner. By enforcing a policy of denying incomplete petitions, the Commission would reduce or eliminate the present strong incentive for petitioners to delay disclosing market information required by both the Commission and objecting parties until it is too late for effective response.

III. CONCLUSION

These defects in the current forbearance petition process, though procedural in nature, threaten the integrity of the process and its very purpose, which is to protect interests of the public, including the citizens of Philadelphia who depend upon reasoned policy determinations for protection against the monopolistic pricing

⁸ 47 U.S.C. § 160(a) (1)-(3).

⁹ NATOA Comments at 6.

the Act seeks to prevent. To protect this public interest, it is incumbent upon the Commission, for the reasons described in these comments, to adopt procedural rules that promote the development of a full and fair record, and that eliminate the present incentives for petitioners to manipulate the record to their advantage and the prejudice of objecting municipalities and competitors.

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Respectfully submitted,

THE CITY OF PHILADELPHIA

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